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Submitted Via email to: [mrp.reissuance@waterboards.ca.gov](mailto:mrp.reissuance@waterboards.ca.gov)

**TO:** Bruce Wolfe, Executive Officer  
Attn: Dale Bowyer  
California Regional Water Quality Control Board,  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

**FROM:** Gary J. Grimm

**RE:** **Tentative Order for the Municipal Regional Stormwater NPDES  
Permit for Discharges from Municipal Phase I Permittees  
Public Comment Submission on the Tentative Order**

These comments are submitted on behalf of the Alameda Countywide Clean Water Program (“ACCWP”) and its member agency Permittees.<sup>1</sup> The comments are intended to address legal and regulatory concerns relating to the Tentative Order for the Municipal Regional Stormwater NPDES Permit (“MRP”) and accompanying documents (including Fact Sheet) for reissuance of the Municipal Regional Stormwater NPDES Permit as released for public comment on May 11, 2015.<sup>2</sup>

**Introductory Comments**

The ACCWP and its member agency Permittees are generally supportive of the objective of effectively addressing pollutant discharges in stormwater in a cost-effective manner so

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<sup>1</sup> The Alameda Countywide Clean Water Program is composed of 17 cities and county entities in Alameda County including the Cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, and Union City, Alameda County (for the unincorporated area), Alameda County Flood Control and Water Conservation District and Zone 7 of the Alameda County Flood Control and Water Conservation District. These entities each have jurisdiction over and/or maintenance responsibility for their respective municipal separate storm drain systems and/or watercourses in Alameda County.

<sup>2</sup> We also support the legal comments being submitted by Robert Falk on behalf of the SCVURPPP.

as to maintain and improve the quality of waters in the San Francisco Bay Region. This support and commitment has been demonstrated by Permittee efforts and accomplishments over the course of the existing and previous MS4 stormwater permits and the testimony provided in the Water Board workshop hearings. This support and commitment continues in light of significant challenges, both technical and financial, that it faces in this next permitting phase of the MRP as set forth in the Tentative Order. However, it will be necessary for the Water Board to favorably and successfully resolve the ACCWP, Permittee, and legal/regulatory comments and issues raised for this continued commitment to be fully and effectively implemented.

Finally, we are appreciative of the collaborative process involving Water Board staff that has taken place and continues to take place in this permitting process, including issuance of the administrative draft, the steering committee meetings, and the many meetings and discussions that have occurred in a cooperative effort with the MS4s, the environmental community, and other parties involved and affected by the issuance of this NPDES permit.

**COMMENT 1 - Provision C.1/C.14, Issue Relating to Bacterial Controls/Pathogen Indicators**

Provision C.1 requires compliance with discharge prohibitions and receiving water limitations. This Provision provides that if exceedances of water quality standards persist in receiving waters, implementation of additional procedures is required. However, the additional procedures are not required for exceedances for water quality standards for pesticides, trash, mercury, PCBs, and bacteria that are managed pursuant to Provisions C.9 – C.14.

While there are stand-alone provisions in the Tentative Order for pesticides, trash mercury and PCBs, none exists for bacteria. We agree with and support the intention of this approach as set forth in Provision C.1; however, we note that the bacteria control measures set forth in Provision C.14 currently relate only to the City of Pacifica and San Mateo County Fecal Indicator Bacteria Controls. The exception stated in C.1 for bacteria controls should be clarified in Provision C.14 so as to extend to all Permittees regulated by the permit that effectively implement and manage bacteria controls measures as set forth in Provision C.8.d.vi. for Pathogen Indicators.

**Recommended Action:** In Provision C.1, end the second sentence immediately after “Receiving Water Limitations B.1 and B.2” which would delete the language “for the pollutants in receiving waters identified in the provisions.” In addition, include a statement in Provision C.14 that states that for all receiving waters other than San Pedro Creek and Pacific State beach described in Table 14.1, Permittees are required to comply with the monitoring and follow-up requirements set forth in Provision C.8.d.vi.

## **COMMENT 2 - Provision C.1, Alternative Compliance Pathways**

The State Water Board recently has adopted Order No.WQ 2015-0075. In that Order, the State Board directed that upon issuance/reissuance of Phase I MS4 stormwater permits, the regional boards should consider an alternative compliance approach for receiving water limitation compliance as described in the Order. There is no reference to this Order in Provision C.1 or the findings of the Tentative Order. The only partial reference to alternative compliance pathways considerations is in the Fact Sheet pp. A-22, but reference is not specifically made to the Order.

This is not sufficient. The Provision C.1 alternative compliance relationship to Prohibition A.2 and Receiving Water Limitations B.1 & B.2 that relates to alternative compliance needs to be clarified and strengthened. It is critical to Permittees that they not face the threat of resource-draining enforcement/litigation because the only reference in the permit adoption process is not specifically contained in the findings or provisions of the permit itself, but is only a partial reference in the Fact Sheet.

**Recommended Action:** Finding 11 should be supplemented to acknowledge the precedent of this State Board Order, and expressly state that that, consistent with guiding principles of the State Order, Provisions C.1 and C.9-14 are intended to provide the co-permittees with an alternative compliance pathway relative to Discharge Prohibition A.2 and Receiving Water Limitations B.1 & B.2 with respect to pesticides, trash, mercury, polychlorinated biphenyls, copper and bacteria.

## **COMMENT 3 - Provision C.3.b.i, previously approved projects**

The Second paragraph of Provision C.3.b.i relates to previously approved Regulated Projects, and requires that any Regulated Project that was approved with no Provision C.3 stormwater treatment requirements under a previous MS4 permit, and that has not begun construction by the effective date of this permit, must fully comply with the C.3.c. & d. requirements. .

This deletion of the requirement exemption from that described in the existing MRP is unacceptable to the co-permittees. First, it should be noted that there are very few of these projects remaining that will go forward. In addition, as these projects may have legally vested rights to proceed, they would be under no legal obligation to comply with additional directives of the municipality relating to C.3 requirements, thus, placing the municipalities in a very awkward position and raises significant conflicts for the municipalities.

**Recommended Action:** This language should be deleted from the Tentative Order, and the language of the existing MRP should be retained in the Tentative Order.

**COMMENT 4 - Provision C.12.a.ii.(4) third paragraph, Countywide Urban Runoff Programs responsibility**

This Provision requires Permittees to implement control measures to achieve county-specific load reduction criteria set forth in Table 12.1. However, the first sentence of the third paragraph of Provision C.12.a.ii.(4) provides that the Countywide Urban Runoff Programs are responsible for the specific portions of the Permit-wide load reduction shown in Table 12.1. The Programs are not waste dischargers under the permit, thus, this statement regarding responsibility of the Programs is inappropriate.

The Permittee compliance paragraphs that follow relating to Table 12.1 provide a confusing and unclear compliance pathway for Permittees. Furthermore, the population based default lacks a nexus to the potential for PCB load reduction in that different co-permittee jurisdictions in that land area and industrial development often have little relation to population in that area. This is further discussed in the ACCWP comments.

**Recommended Action:** The third paragraph of Provision C.12.a.ii.(4) should be deleted.

**COMMENT 5 - Provision C.11.c & C.12.c, Imposition of Mercury and PCB Load Reduction Requirements Over the Final Three Years of the Permit Term**

Provisions C.11 & C.12 impose requirements for these legacy pollutants already in the Bay system that will be extremely challenging to implement, both from a technical and fiscal perspective. This has been emphasized by Permittees in the Board workshop hearings.

Provisions C.11.c. & C.12.c require Permittees to implement green infrastructure projects during the term of the permit in order to achieve PCBs and Mercury load reductions. These load reductions of 120 grams/year for PCBs and 48 grams/year for Mercury shall be achieved over the last three years of the permit. The Provisions require implementation of sufficient green infrastructure projects to achieve the county-specific load reduction performance criteria shown in Tables 11.1 & 12.2. The intention and description in the Tentative Order of these load reduction performance criteria are ambiguous and vague. This language is easy to misinterpret placing the MS4s at risk in regulatory/litigation enforcement actions.

The co-permittees lack clear paths to compliance and sufficient controls have not been provided in this permit to assure that numerically denominated quotas of mercury and PCB load reductions will be realized in each of the last three years of the permit. To now connect Green Infrastructure to PCB and mercury load reductions, when there is little technical basis for predicted reductions is legally inappropriate.

Permittees lack sufficient control to assure that numerically denominated quotas of mercury and PCB load reductions will be realized in each of the last three years of the permit, and as currently stated, these green infrastructure requirements are contrary to the

Basin Plan - and this remains the case regardless of whether such quotas are defined on an area-wide, county-level, or proportionate Permittee specific basis.

Finally, and of significant importance, the State Board has repeatedly found that numeric effluent limitations have not yet proved feasible for MS4 dischargers<sup>3</sup>

**Recommended Action:** It is essential that it be made clear that these projected load reductions over the last three years of the permit and the performance criteria of Tables 11.1 and 12.1 are not narrative or numeric effluent limitations, but are goals or at most, Numeric Action Levels for load reduction in the design and implementation of green infrastructure projects.

### **COMMENT 6 – Unfunded State Mandates**

Many provisions of the Tentative Order are more stringent than required by federal law and constitute unfunded state mandates in that they impose new programs or higher levels of service on the co-permittees, and therefore will violate Article XIII B, Section 6, of the California Constitution.<sup>4</sup>

The Tentative Order does not contain sufficient findings, nor does the evidence in the record support the Regional Board's conclusion in the Fact Sheet that the permit does not require actions beyond the MEP.<sup>5</sup> Given the disparity of resources and heterogeneous nature of the co-permittees, blanket evidence and findings as discussed in the Fact Sheet purporting to apply to all permittees (or from Southern California) cannot suffice. If the

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<sup>3</sup> As an example, the State Water Board's expert input on this subject concluded that numeric effluent limitations are not yet feasible for municipal stormwater. State Water Board Storm Water Panel of Experts, The Feasibility of Numeric Effluent Limits Applicable to Discharges of Storm Water Associated with Discharges from Municipal, Industrial and Construction Activities (June 19, 2006). The State Water Board has subsequently found that this remains the case even for non-municipal stormwater discharges and, accordingly, it deleted NELs from the Construction Storm Water General Permit Order No. 2009-0009-DWQ and even, more recently, from the Industrial Storm Water General Permit (Order No. 2014-0057-DWQ).

<sup>4</sup> The Alameda Countywide Clean Water Program and its member agencies reserve all their rights to pursue unfunded mandate challenges to a reissued MRP under applicable law, including as subject to the new U.S. EPA Waters of the United States rule soon to be codified in federal regulations, and as may be further clarified by the California Supreme Court. They also wish to make it absolutely clear that the record indicates that they have not waived such rights, including by volunteering through their comments, prior suggestions, previous actions, permit re-applications, or their cooperation and negotiations with the Water Board's staff, to be deemed to have voluntarily accepted any of the new program or higher level of service requirements contained in the T.O., including without limitation Provisions C.3.c.i.(2)(b), C.3.i, CC.3.j, C.8, C.10.a.i., C.10.a.ii.b, C.10.b.i.a and b, C.10.b.ii, C.10.b.v, C.11.c & d, C.12.c., C.12.d, C.12.f.

<sup>5</sup> We object to the incorporation of the Fact Sheet into the permit by reference. We believe that the Fact Sheet is more appropriately considered as background information relating to contents of the Tentative Order. The Fact Sheet should not be made part of the findings of the permit. See 40 CFR §§ 124.6, 124.8.

Regional Board claims the right to make this determination, it at least has the obligation to provide an adequate record and findings to support its determination.

The California Supreme Court is currently considering the case of *Department of Finance, et al. v. Commission on State Mandates/County of Los Angeles, et al.*, Case No. S214855, which will clarify many issues on this subject including that jurisdiction to determine what aspects of the Tentative Order constitute unfunded state mandates properly rests with the Commission on State Mandates and not with the State's Water Boards.

**COMMENT 7 – Restrictions on Co-Permittees to Fund Actions Required by the Tentative Order.**

As Permittee testimony at the workshop hearings have indicated, MS4s are faced with significantly increased costs to local government associated with more stringent requirements anticipated by the provisions of the Tentative Order. Many other commentors have noted and described these consequences in their written responses as well to the Water Board. Consequently, to avoid contentious advocacy proceedings that may consume large amounts of resources on detailed administrative appeals and litigation that could instead be spent on water quality improvement, the Tentative Order should be revised in a manner reflecting consensus with Bay Area local governments on priorities and realistic implementation timetables (which in some cases may have to be phased into future permit terms) and/or the relevant requirements must be conditioned on the receipt of State funding guaranteed to help the municipalities staff and finance their implementation.

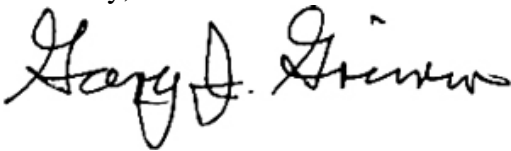
In addition, Permittees are significantly restricted in their ability to increase fees for stormwater improvements and control by the provisions of Proposition 218. In November 1996, California voters adopted Proposition 218, the Right to Vote on Taxes Act, which added articles XIII C & D to the California Constitution. These constitutional provisions specify significant restrictions and requirements for assessments, fees, and charges that local governments impose on real property or on persons as an incident of property ownership.

As a general rule, it is not possible to create a new or increase an existing stormwater-specific fee without complying with Proposition 218 which, with the exception of wastewater, refuse, and water service, in some cases requires voter approval. The possibility of receiving grant funding is problematic because it entails expense, and then, is not guaranteed. Limited grant funding is available and applying for grants can be very time consuming - many costs are not eligible for reimbursement, local funding is often required; the applicant must advance funds; and there is no guarantee of receiving a grant. At the same time rate payer and political sensitivity has increase with regard to fees. With so little funding available from grants and general revenues constrained by competing service demands, it is increasingly difficult to fund new or increased stormwater programs. Legislative efforts that would lead to modification of Proposition 218 to exempt fees for stormwater control have not been successful.

**Recommended Action:** Carefully consider the significant financial constraints facing Permittees before imposing requirements that would necessitate significant and additional expenditures of funds by local agencies.

Thank you for the opportunity to submit these comments on behalf of the Alameda Countywide Clean Water Program and its Permittee member agencies. We look forward to continuing to work with the Water Board staff to trying to cooperatively resolve or at least narrow the concerns we have raised so that future legal challenges can be avoided.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary J. Grimm". The signature is written in a cursive, flowing style.

Gary J. Grimm

Cc: Tom Mumley  
ACCWP Management Committee  
Jim Scanlin